IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL NO 741 of 2002

with

CIVIL APPLICATION NO 7016 of 2002

in

SPECIAL CIVIL APPLICATION NO 10725 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE B.J.SHETHNA
and
Hon'ble MR.JUSTICE RAVI R.TRIPATHI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

AHMEDABAD DISTRICT CO-OP. BANK LTD.

Versus

SURESHBHAI BABUBHAI SUNARA

Appearance:

1. LETTERS PATENT APPEAL No. 741 of 2002

MR TUSHAR MEHTA for Appellant No.

MR MM TIRMIZI for Respondent No. 1-31,33-71,73-74,76-117

NOTICE SERVED BY DS for Respondent No. 1

NOTICE SERVED for Respondent No. 32,72,75,118

CORAM : MR.JUSTICE B.J.SHETHNA
and
MR.JUSTICE RAVI R.TRIPATHI

Date of decision: 05/08/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE B.J.SHETHNA)

1. Against the Judgment and order dated 1.7.2002 passed by the learned Single Judge of this Court, allowing the Special Civil Application No.10725 of 2001, filed by the respondents petitioners, the original respondent No.1 - Ahmedabad District Co.Operative Bank Ltd. has filed this Letters Patent Appeal.

2. The respondents - original petitioners claimed to be the members of Vatva Kadamgiri Co.Op.Housing Society Ltd. (for short "the Society"). They had approached this Court by way of writ petition i.e. Special civil Application No.10725 of 2001 against the impugned order dated 17.8.2001 passed by the Gujarat State Co.Operative Tribunal (for short "the Tribunal") in Lavad Appeal No.68 of 2000.

3. It is the case of the respondents - original petitioners that the erstwhile Organizer and the developer of the society, viz. Shri Naranbhai Pandya and others had obtained loan of Rs.18,13,000/- from the Appellant - Bank. It is the case of the original petitioners that erstwhile organizer had dummy members in the society. According to them they became members of the society in 1990, whereas the loan was taken in between 1981 to 1985. They came to know only when the recovery notice was issued against them that one Lavad Suit No.494/96 was decreed exparte. There are in all 159 members of the society, out of which 117 members, as the respondents - original petitioners, filed restoration Application No.187 of 1997 before the learned Board of Nominee. The learned Nominee stayed its Judgment and order on condition of depositing a sum of Rs.11 lacs, which was beyond the capacity of the original petitioners. Therefore, instead of depositing the said amount the members of the Society had approached this Court earlier by way of Special Civil Application No.8971 of 1997, which was disposed of by this Court on 31.1.2001 on the ground that without exhausting the alternative

remedy they had approached this Court. Therefore, they may file Appeal or Revision within 2 weeks from the date of order for redressal of their grievances before the Tribunal, and the Tribunal was directed to decide their case on merits in accordance with law without going into the question of limitation within a period of one month thereafter. However, it is the case of the appellant Bank that the said petition was filed by the Society and not the present respondents - original petitioners.

4. In view of the order dated 31.1.2001, passed by this Court in Special Civil Application No.8971/97, instead of society, the present respondents - original petitioners approached the Tribunal by way of Appeal No.68 of 2000 which was dismissed by the learned Tribunal by its impugned order dated 17.8.2001, on a highly technical ground that no Application for leave to Appeal was filed in the said Appeal by them. Thus, without entering into the merit of the case the Tribunal straightway dismissed the Appeal.

5. Aggrieved of the aforesaid order passed by the Tribunal, 117 persons - original petitioners, approached this Court by way of Special Civil Application No.10725 of 2001. Before the learned Single Judge, on behalf of the Appellant Bank, the contention was raised by the learned Counsel for the appellant Bank that the order dated 31.1.2001 was passed by this Court in Special Civil Application No.8971/97 in a petition filed by the Society, therefore, the petitioners were not entitled to the benefit of the said order. The learned Single Judge rejected that contention on the ground that the order was passed by this Court on 31.1.2001 after hearing the Appellant - Bank. The learned Judge has also observed that when this Court gave liberty to the society to prefer an Appeal then there was no justification for not extending the same benefit to the majority of 117 members of the society, who were directly and vitally affected by the out come of the proceeding invited before the learned Nominee. The learned Judge also rejected that contention on the ground that no such contention was raised by the Bank before the Tribunal.

6. Another contention was raised before the learned Single Judge by the learned Counsel Shri Vakharia for the Appellant - Bank that there was no privity of contract between the Bank and the members of the society. However, the learned Single Judge was of the view that in every cooperative society the members are not the third party to any litigation of the society, more particularly, when it is for the purpose of recovery of

amount from the property of the society which is given by the society to its members. The learned Single Judge has also observed that if the society remains lethargic or does not defend the rights of the members properly then it cannot be said that the members had no right and that they have to simply act like silent spectators of the functioning of inefficient or dummy office bearers and to abide by the order though they have other remedy available under the law. The learned Single Judge was also of the view that in a housing society when the members were allowed to occupy the property and on account of some outstanding debt against the society if the recovery is to be made from the property then it cannot be said that members were not affected or aggrieved. When the Nominee has passed the Award then they can certainly challenge it before the Tribunal. On peculiar facts of this Case the learned Single Judge distinguished the Judgment of the Hon'ble Supreme Court in the case of DAMAN SINGH which was sought to be relied upon by the learned Counsel for the appellant Bank as it was a case of amalgamation, whereas in this case there is a direct recovery made against the members. Similarly, the learned Single Judge has also distinguished the Judgment of this Court in LPA No.190 of 1995.

After considering the submissions made by the learned Counsel for the parties before him the learned Single Judge came to the conclusion that the Tribunal was not justified in dismissing the Appeal on the ground that no Application for leave to file Appeal was preferred. Therefore, it can not decide the Appeal on merits. The learned Single Judge has also observed that sound judicial discretion demand that the Tribunal should have given an opportunity to the petitioner to file such Application for leave to Appeal. The learned Single Judge further held that in absence of an Application for leave to Appeal the Tribunal should have decided the Appeal on merits as there was already an order of this Court passed on 31.1.2001 in Special Civil Application No.871 of 1997 to decide the Appeal on merit, whether the Appeal filed by the Society or the members it would make any difference.

7. In Para : 14 of the Judgment the learned Single Judge has clearly observed that by passing the impugned order the Tribunal has not committed jurisdictional error, but has not observed the sound principles of judicial discipline. According to the learned Single Judge when this Court issued specific direction to decide the Appeal on merit then it was highly improper on the part of the Tribunal not to entertain the Appeal on the

ground that there was no Application for leave to file Appeal.

8. Having carefully gone through the entire Judgment and order passed by the learned Single Judge, allowing the Special Civil Application No.10725 of 2001, it clearly appears to us that the learned Single Judge has exercised his jurisdiction only under Article 227 of the Constitution though the petitioner has labelled the petition under Article 226 as well. Strictly speaking, in our considered opinion, the petition was under Article 227 of the Constitution only and the learned Single Judge also exercised the jurisdiction as such under Article 227 only and not under Article 226 of the Constitution. In fact it was the submission of Shri Vakharia, learned Counsel for the Bank that the learned Single Judge ought not to have exercised jurisdiction under Article 227 of the Constitution of India. It is true that though the petition was labelled as petition under Article 226 & 227 of the Constitution of India, in a real sense it was a petition under Article 227 of the Constitution and the learned Single Judge also exercised his jurisdiction under Article 227 of the Constitution. Therefore, when it was pointed out to Shri Vakharia that when the petition was under Article 227 of the Constitution and in fact the learned Single Judge also exercised his jurisdiction under Article 227, then the Letters Patent Appeal against such order passed by the learned Single Judge would not be maintainable before this Court. Then Shri Vakharia half-heartedly submitted that the learned Single Judge exercised his jurisdiction also under Article 226 of the Constitution. It was too late in a day to submit that the petition was under Article 226 and the learned Single Judge has also exercised his jurisdiction under Article 226 as well as 227 of the Constitution of India.

9. Having carefully gone through the averments made in the petition as well as the entire Judgment of the learned Single Judge of this Court allowing the writ petition filed by the respondents - petitioners, it is clear that the writ petition was only under Article 227 of the Constitution, though Article 226 was also mentioned in it, and the entire Judgment of the learned Judge proceeded as if he was exercising his jurisdiction under Article 227 of the Constitution and not under Article 226 of the Constitution. In that view of the matter Letters Patent Appeal against the Judgment and order passed by the learned Single Judge was not maintainable. Therefore, without going into the merits of the case this Letters Patent Appeal was required to be

dismissed as not maintainable.

10. Even assuming for the sake of argument that Appeal was maintainable then also this Court would not have interfered with such an order passed by the learned Single Judge exercising his jurisdiction under Article 227 of the Constitution in view of the Judgment of the Hon'ble Supreme Court in the case of MOHD.YUNUS v/s. MOHD.MUSTAQIM & ORS., reported in AIR 1984 SC 38, wherein the Hon'ble Supreme Court has observed as under :

> "A mere wrong decision without anything more is not enough to attract the jurisdiction of the High Court under Article 227. The supervisory jurisdiction conferred on the High Courts under Art.227 of the Constitution is limited "to seeing that an inferior Court or Tribunal functions within the limits of its authority", and not to correct an error apparent on the face of the record, much less an error of law. In exercising the supervisory power under Art.227, the High Court does not act as an Appellate Court or Tribunal. It will not review or re-weigh the evidence upon which the determination of the inferior court or tribunal purports to be based or to correct errors of law in the decision."

11. From the Judgment of the learned Single Judge it is clear that the learned Tribunal had committed jurisdictional error by not exercising its jurisdiction in favour of the respondents - original petitioners in not entertaining the Appeal on the ground that no Application was filed for leave to Appeal. In such circumstances we would not have interfered with the order passed by the learned Single Judge even if the Letters Patent Appeal was maintainable.

12. Before parting, we must state that in para : 15 of the Judgment the learned Single Judge, while quashing and setting aside the order passed by the Tribunal, issued clear direction to the Tribunal that it shall decide the Appeal of the petitioner on merit after extending the opportunity of hearing to the parties concerned. Therefore, it will be always open to the appellant - Bank to raise the contention on merit before the Tribunal in Appeal.

13. One more fact which is required to be stated by us is that in the instant case the learned Nominee passed exparte order in favour of the appellant - Bank. Initially, out of in all 159 members of the society, 117

members - the present respondents - original petitioners, approached the Court of Nominee by way of Restoration Application No.187 of 1997 for restoration on 3.10.1997. In fact, the learned Nominee entertained that restoration Application and stayed its order on condition of depositing in all Rs.11 lacs, which was beyond the capacity of the original petitioners, therefore, at first instance the petitioner filed Special Civil Application No.8971/97, through Society, before this Court, which was disposed of by the learned Single of this Court on 31.1.2001 on the ground of alternative remedy available to the petitioner by way of Appeal before the Tribunal and the Tribunal was directed to entertain the Appeal irrespective of limitation. If the Court of Nominee can entertain the Restoration Application, filed on behalf of the respondents - original petitioners against its exparte Judgment and order passed in Lavad Suit on condition then, we are of the considered opinion that certainly they can approach the Tribunal by way of Appeal. It is because of the rigorous condition imposed by the Nominee to deposit Rs.11 lacs, initially members through the Society approached this Court by way of writ petition which was allowed by this Court and the Tribunal was directed to entertain the Appeal irrespective of limitation but for some or the other reason the society has not filed appeal, therefore, its members-original petitioners approached the Tribunal. In that view of the matter, we are of the opinion that the Tribunal should not have dismissed their Appeal for not filing an applicatin leave to Appeal. The Tribunal was bound by the order passed by the High Court and directions issued in the order and in the peculiar case who filed an appeal was not important. It could have been either by the society or in its absence its members.

14. In view of the above discussion, this Appeal fails and is hereby dismissed with no order as to costs. Notice discharged.

15. Civil Application No.7016 of 2002 is dismissed as the main Appeal is dismissed.

16. It seems that because of the pendency of the Appeal, though there was no interim relief granted by this court in Civil Application, the Tribunal has not proceeded to decide the Appeal on merit as ordered by the learned Single Judge. In that view of the matter with the dismissal of this Appeal the Tribunal is now directed to decide the Appeal on merit, as directed by the learned Single Judge. It shall decide the same as early as possible and not later than 3 months from the date of

receipt of this order. The writ be sent down to the Tribunal forthwith.

(B.J. Shethna, J.)

Date : August 05, 2003

(Ravi R.Tripathi,J.)

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